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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-66

SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION AND SCHOLLE NORTHLAKE CORPORATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

MILTON A. SMITH,
General Counsel,

OTTO F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South La Salle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Gunthorp-Warren Printing Company, Chicago • 346-1717

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

INTEREST OF THE AMICUS CURIAE.*

This brief is filed on behalf of The Chamber of Commerce of the United States of America, a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals.

* Pursuant to Rule 29, F. R. A. P., there have been lodged with the Clerk of the Court the written consents of the parties to this proceeding to the filing of this brief *amicus curiae*.

It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters both in the United States Supreme Court and the Courts of Appeals. Examples of cases recently decided by the Supreme Court in the area of labor relations in which the Chamber has appeared include *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Market* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *Burns International Security Services, Inc.*, ... U. S. ...., 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U. S. 3 (1970).**

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally, since it involves a question of theoretical significance in the administration of the National Labor Relations Act which also has enormous practical importance in employers' right to control the use of their private property. Thus, this case presents for decision a balancing between unions' assertion of statutory rights and employers' assertion of conflicting Constitutional guarantees. The importance of these issues, which frequently recur to jeopardize the Chambers' members' interests and their Constitutional guarantees, impels the Chamber to submit its view for the consideration of this Court.

** During the Supreme Court's 1972 Term, the Chamber has also participated as *amicus curiae* in *N. L. R. B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, No. 71-7111; *N. L. R. B.* v. *International Van Lines*, No. 71-895; *Sid Harvey Inc. and Sid Harvey Brooklyn Corp.* v. *Local 810, et al.*, No. 72-556; *Phelps Dodge Corporation* v. *AFL-CIO Joint Negotiating Committee for Phelps-Dodge Corporation, et al.*, Nos. 72-220, 72-359; and *Terminal Freight Cooperative Association, et al.* v. *N. L. R. B.*, No. 72-501.

REASONS FOR GRANTING THE WRIT.

Introduction and Summary.

The extent to which employers must make their private premises available to unions seeking to organize their employees constitutes a serious and recurring problem in the interpretation of the National Labor Relations Act. The general test to measure the legality of an employer's rejection of a non-employee's request to distribute literature on his property is set forth in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956). There, this Court struck a balance between the right of an employer to control or limit the uses of his property and the competing right of employee self-organization which depends "in some measure on the ability of employees to learn the advantages of self-organization from others." In resolving that conflict this Court held that: "It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . ."

In applying this general test, the Board and the lower courts must consider the range of available channels of communication, evaluating their effectiveness in combination. Unless, in the unusual case, it is clear from objective facts that utilization of these channels would necessarily be ineffective to reach employees, the Board and the courts must affirmatively require the union to exercise reasonable efforts to utilize these channels and then to show that despite these efforts employees are and will remain inaccessible, before permitting the union to solicit employees on private property. That is, before an employer should be compelled to open its property to non-employee organizers, the union must establish that, even by exercising reasonable efforts through other available channels of communication, it is nonetheless unable effectively to reach employees with its message.

While in obedience to *Babcock* this test has been employed by the Eighth Circuit in *Central Hardware Co.* v. *NLRB*, 468 F. 2d 252 (8th Cir. 1972) (on remand from 407 U. S. 539 (1972)) and by the Ninth Circuit in *NLRB* v. *Sioux City and New Orleans Barge Lines, Inc.*, 72-1059 (decided February 2, 1973) the court below, however, although purportedly relying upon *Babcock*, employed a quite different and inconsistent test. This has resulted in a conflict among the Circuits in connection with the resolution of this oft-recurring problem under the National Labor Relations Act. Specifically, the court below compelled no affirmative duties from the union as did the Eighth and Ninth Circuits, failed to consider the existence and effectiveness of the available means of communication which the union had not even begun to utilize, and required that an employer's property rights must yield to a union's organizational interests whenever the use of alternatives to the employer's property appeared less efficient, sure and convenient than would access to that property.

Apart from its disagreement with the other Circuits, the Seventh Circuit decision simply nullifies the criteria enunicated in *Babcock*, because an employer's premises will almost invariably be the most efficient, sure and convenient access to its employees. But, as the Eighth Circuit said in *Central Hardware*, "this falls far short of meeting the Union's burden of establishing that no reasonable means of communication existed other than solicitation on the parking lot." The Seventh Circuit's test, unlike the test in *Babcock* which was properly applied by the Eighth and Ninth Circuits, requires, in effect, that the employer aid the union's organizational activities and that the union be able to impart its message to employees in the most preferred manner, *i.e.* from the employer's premises. In order to resolve the manifest confusion among the Circuits as to the nature of the test to be applied in this recurring problem, this court should grant *certiorari*.

An additional reason exists for this Court to review this case. The circumstances under which a union may enter upon private property to solicit during an organizational campaign have been significantly changed by the Board's *Excelsior* rule and the even more recent emphasis on elections to determine representative status. The *Excelsior* rule was enunciated by the Board in *Excelsior Underwear Inc.*, 156 NLRB 1236, in 1966, ten years after *Babcock*. There, the Board ruled that an employer must furnish a union with the name and address of each unit employee after an election is scheduled and not less than ten days before the election. Coupled with the policy that elections are the preferred method to determine representative status, the *Excelsior* rule guaranteed a union access to each unit employee during the election campaign. The *Excelsior* rule accomplished a purpose of *Babcock* by assuring the right of unions to reach employees with their message. It is therefore appropriate to interpret the requirements of *Babcock* in light of *Excelsior*.

ARGUMENT.

I.

The Failure of the Court Below to Apply a Rule Adequately Recognizing the Existence of Alternative Means of Communication Violates This Court's Babcock Test and Creates a Conflict Among the Circuits.

In *Babcock*, this court stated that the Act "does not require that the employer permit the use of its facilities for organization when other means are readily available." Here, during the organizing campaign, the union possessed a list containing the names and addresses of approximately 60% of the employees in the proposed bargaining unit. While the court below emphasized the fact that the union was not certain of the accuracy of each of the names and addresses on its list and heavily relied upon this to permit the union to organize on the employer's

property, here, too, that court is in direct conflict with the Eighth Circuit which stated in *Central Hardware Co., supra,* in a fashion consistent with *Babcock*, that "The burden was not on the company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel." Mailings and home visits constitute conventional means of communication and presumptively present an opportunity to reach employees other than on the employer's premises. In order to prove that there is no opportunity to reach employees other than by solicitation on private property, the union, in obedience to the *Babcock* test, had to establish that the list was inaccurate, and this the union did not do. The union's stated uncertainty of the accuracy of the employees' names and addresses is not equivalent to required affirmative proof that the list was inaccurate and that despite utilizing the list, employees were inaccessible. The Seventh Circuit's reliance upon this assertion is totally misplaced and resulted from a misapplication of the *Babcock* test.

Though the effectiveness of channels of communication should be evaluated in combination, the union here, by possessing a presumptively accurate list of employees had a readily available means to reach these employees by letter or home visit, irrespective of the availability of any other avenue of communication. The court below failed to obey the *Babcock* test when it held that the employees remained inaccessible and that the union therefore could use the employer's premises for organizational purposes.[1]

In obedience to the *Babcock* test, the Board itself in *The Falk Corporation*, 192 NLRB No. 100 (1971) and in *Monogram Models Inc.*, 192 NLRB No. 99 (1971), has declined to

1. Though the union here possessed the names and addresses of 60% of the unit's employees, practically, far fewer than 60% need to be reached by direct communication in order for the union's message to be disseminated to all, because it is reasonable that employees who are confronted with a union campaign will exchange with one another views and information relating to the advantages or disadvantages of selecting the union.

permit union organizers to have access to the employer's private property under the circumstances of those cases, although the union had a list of only 25% of the unit complement in *Falk* and no list in *Monogram*. Given the results of those cases, the same result should have followed here *a fortiori*.

Though *Babcock* involved a community of 21,000 people, while the employer here is located in the Chicago metropolitan area, the employers in *Monogram*, *Falk*, and *Central Hardware* were located in metropolitan Chicago, Milwaukee, and Indianapolis, respectively. Not only is there nothing unreasonable in expecting a union to attempt to reach employees at their homes, particularly when, as here, it possessed a list containing the names and addresses of a significant percentage of these employees, but also, the Eighth Circuit in *Central Hardware*, rejected the invitation to adopt a "big city" rule and a different small town rule in applying *Babcock*. Rather, that court, quoting *Monogram*, stated that the location of the plant in a metropolitan area does *not* itself justify the conclusion that employees were beyond the reach of reasonable union efforts to communicate with them other than on the plant premises. Thus, the court below conflicts with the Eighth Circuit by effectively adopting such a "big city rule" and incorporating in such a rule a disregard for other available means of communication with employees.

Here, then, the presumptively accurate list of names and addresses possessed by the union, during its organizational campaign constituted an available means to communicate with these employees at least by mail or visits, under the *Babcock* test, so that the employer could validly post his property against union solicitation.

Moreover, and still more significantly, there were here other effective avenues for communication that were unexplored by the union and inadequately considered by the court below. The record in this case reveals that no or scant efforts were made by the union to reach employees either by radio, newspaper, organization meetings, telephone or otherwise. While the law

will not impose on parties the duty to engage in futile acts, the union here has not met its burden under *Babcock* to show that the use of these other alternatives would have been futile. Such alternatives may not have been as convenient or as sure or as inexpensive as the invasion of private property for direct personal contact, but the law requires only that the other avenues of communication be reasonably effective, not that they be in all respects comparable to solicitation on the employer's property.

It is not sufficient for the union here to merely assert that conventional methods of communication such as the radio or newspaper were not feasible because the employees involved live in a large metropolitan area. As noted *supra*, such an assertion was rejected by the Board in *Monogram*, where the employer was located in the Chicago metropolitan area just as the employer here, and was rejected by the Eighth Circuit in *Central Hardware*, citing *Monogram*, which found that the mere fact that employees lived in a metropolitan area did not justify the conclusion that the employees were inaccessible or that reasonable attempts to communicate with them would be ineffective; indeed, the Eighth Circuit expressly recognized that the union had open to it many of the conventional means of communication, including mail, telephone, and personal contacts.

Thus it should have been considered by the court below, properly interpreting *Babcock*, as fatal to the union's case that it failed to exercise reasonable efforts to utilize avenues of communication available to it, including advertising in local and metropolitan newspapers, on the radio during hours when employees would be driving to and from work, or on local television programs.

As an indication of such means which the unions have successfully employed, with only a slight exercise of diligence and ingenuity, we refer the Court to a study made in 1967 of the activities of the Retail Clerks Union, as revealed in editions of its magazine, "The Retail Clerk's Advocate." Not all such

devices or alternatives would be appropriate in this or any case, but they reveal what can be achieved by a union which is willing to accept its duty to seek out effective means of communication. Those means included, for example, a consumer boycott involving the use of balloons and bumper stickers (June, 1967, page 3); announcements on national television (July, 1967, page 18), at state and county fairs, holiday celebrations and other festivals (October, 1967, page 12); extensive distribution of shopping bags with imprinted messages which recipients would tend to retain more than handbills (June, 1967, page 5 and October, 1967, page 12); outdoor billboards (July, 1967, page 14); sponsorship of local radio and television programs (October, 1967, page 12 and April, 1967, page 16); sponsorship of local sports teams (October, 1967, page 28); union industry exhibits (July, 1967, page 14); and a caravan of automobiles with signs inviting spectators' attention (January, 1967, page 28).

To this list should be added the various forms of communication to which this Court made reference in footnote 1 of its *Babcock* decision. Finally, there is no logical or conceptual justification for the Seventh Circuit having sanctioned the union's failure in this case to use the most obvious instrument of communication—the telephone, whose range presumably encompasses the various suburbs in which the bargaining unit's employees resided. With but little effort, the union could have discovered the telephone numbers of the unit's employees by using its list of names and addresses and, then, using this instrument, it could have imparted its message to these employees or arranged for home or organizational meetings.

Just as the court below adopted a legal test which violated the teaching of *Babcock* that available alternative means of communication must be explored by the union, so also did the lower court too lightly dismiss the employer's property rights. If these rights are to yield, it should be only if a union has no means available effectively to reach employees elsewhere. It

cannot be doubted here that the union had ample opportunity effectively to communicate with employees away from the employer's property. Consequently, the decision of the court below adopted a test inconsistent with the *Babcock* rule when it permitted the union to solicit on private property and in doing so also created a conflict between itself and the Eighth and Ninth Circuits.[2] By way of demonstrating the aptness of the latter conclusion, and, by way of contrast with the court below, it is appropriate to examine the elements of those conflicting decisions. In the Eighth Circuit's *Central Hardware*, case *supra*, the Board's Trial Examiner concluded that there were no reasonable means available for the union to reach the employer's employees other than by solicitation on the employer's parking lot. The union there possessed the names and addresses of 80% of the unit employees. Testimony indicated that home visits were unsuccessful in contacting employees. The court, however, stated

> "It is neither surprising nor unusual for an employee to be away from home at the time an unexpected visit is made without prior appointment. The fact that a considerable number of employees were not found at home on the single occasion when [the union representative] made his unscheduled visits falls far short of establishing that home calls are not a reasonable means of communication . . . Repeat visits could doubtless be minimized or avoided by making prior appointments by telephone or letter. Messages and union literature could be left at homes where the employee is absent . . . *There is no evidence that any efforts were made to reach the employees by letter, newspaper or radio advertising or by invitations to union meetings.*" (Emphasis added.)

Applying this Court's *Babcock* test, the Eighth Circuit then held that the evidence did not support the Board's finding that

2. In *Babcock*, this Court apparently did not challenge the Board's finding that it would be unsafe for union organizers to distribute literature on the public right of way. Accordingly, a conclusion here that organizers could not safely distribute literature at the public intersections does not affect the contentions advanced in this brief.

no reasonable means of communication with the employer's employees were available to the union other than by solicitation on the employer's private property.

The facts of *Central* are strikingly similar to the facts of the instant case. The results are different because the Eighth Circuit correctly applied the *Babcock* test while the Seventh Circuit did not.

Further highlighting the conflict between the Seventh and other circuits is the Ninth Circuit's decision in *NLRB* v. *Sioux City and New Orleans Barge Lines, Inc., supra.* The record there as reported by the court revealed that the employer operated boats which were dispersed over a large territory including the area between Sioux City, Iowa and New Orleans, Louisiana. Because these boats were in nearly continuous operation, the crews worked shifts lasting from 30 to 60 consecutive days, and boarded and left the boats either in mid-stream or at ports. While the union had secured a list of employees and their home addresses from the employer, those employees lived at 118 separate residences scattered across 15 states and the union was able to contact only 35 of those 118 employees, approximately 30%, prior to the holding of an election by the Board. Although the Board's order granted the union access to the boats for solicitation, the Ninth Circuit denied enforcement, holding that this order was unsupported by substantial evidence. While in the course of its opinion the court discussed the hardship to the employer, including a potential interference with production, if access were permitted, it is clear from the court's subsequent comments that its conclusion did *not* rely upon that potential hardship. Rather, the court stated:

> "In denying the Board's order for access, we do not hold that the Board in all cases lacks the power to order access where such access may cause interference with production. But before such an order would be appropriate, the union must make a very strong showing of its inability to contact the employees. *We need not explore that question in the posture of this case because here IBU (the union) was able to successfully contact many employees; it succeeded*

> *in meeting face-to-face with 35 of the 118 employees . . . the record shows that with extra effort the union could achieve personal meetings with employees without boarding the tow boats.*" (Emphasis added.)

Thus, the court in effect held that though the union achieved some degree of contact with employees, it had a duty to make even more effort before it could validly claim a right to access to the employer's property. The union's inability to demonstrate to the Ninth Circuit that it made this effort and that it could effectively communicate with employees *only* on the employer's property obviated any need for the court to adjudicate the legal relevance of any potential hardship to the employer which access to his property might have produced.

The principal difference between the *Sioux City* case and the instant case is that in the former the court, properly applying *Babcock*, compelled the union affirmatively to demonstrate that with an expenditure of time and effort in the pursuit of existing and reasonable alternative means of communication the employees would nonetheless remain inaccessible, while in the latter, the lower court compelled no such affirmative duty.

Because of this confusion among the Circuits, in this significant and recurring area of law, it is appropriate for this Court to grant review.

II.

It Is Appropriate to Reexamine the Babcock Test in Light of the Board's Excelsior Rule and the Policy That Favors Elections to Resolve Representative Status.

The circumstances under which private property rights can be infringed upon by organizational rights have been significantly changed by the Board's *Excelsior* rule and the more recent emphasis on elections to resolve representative status. At the time the *Babcock* test was announced, a union, upon demonstrating to an employer that it had authorization cards from

a majority of employees in a proposed bargaining unit, could achieve bargaining rights from the National Labor Relations Board if the employer had no genuine basis to doubt the union's majority, even in the absence of any employer unfair labor practices. *NLRB* v. *George Groh & Sons*, 329 F. 2d 265 (CA 10, 1964), enforcing 141 NLRB 931 (1963); *Cosmodyne Manufacturing Company*, 150 NLRB 96 (1964). The union's opportunity to obtain such bargaining orders without the need for an election put a premium upon the effectiveness of the union's campaign efforts and its access to employees. The *Babcock* test then balanced the right of a union to achieve this majority and bargaining right against the right of an employer to use its property as it desired. However, in 1966 a new factor was introduced which it is appropriate to consider whenever this balance must now be struck. In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Board ruled that an employer must furnish the union with the name and address of each unit employee not less than ten days before a scheduled election. This rule was designed to provide the union with an unqualified opportunity to communicate with all employees in the bargaining unit at an appropriate point in the election process. The validity of this rule and its raison d'etre were upheld by this Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), when it affirmed the Board's broad discretion to insure a fair election and its right, in the manner prescribed by the Administrative Procedure Act, to make rules and regulations necessary to carry out its duties under the National Labor Relations Act.

Following *Excelsior*, this Court issued its decision in *NLRB* v. *Gissel Packing Co., Inc. et al.*, 395 U. S. 575 (1969). With this decision, it became clear that elections were the preferred method to determine a union's representative status, because, even with a majority of authorization cards, a union could not obtain a bargaining right from the Board unless the employer committed unfair labor practices sufficiently serious to make a fair election highly improbable. Consequently, today, the ob-

jective of a union's organizing campaign logically must be to obtain and to win an election. In pursuing this objective, a union generally must obtain authorization cards from only 30% of the unit's employees in order to obtain an election and access to all such employees by the list provided under the *Excelsior* rule. Of course, the number of employees who must be contacted to achieve this 30% depends upon the union's persuasiveness. But, employer property rights should not depend upon that persuasiveness. Because organizational rights are now well protected by the Board's *Excelsior* rule, property rights should not lightly give way to an organizing campaign. Rather, before a union is permitted to solicit on an employer's property, it should be required, even more strictly than before *Excelsior*, to demonstrate by probative evidence that, despite its efforts in utilizing available channels of communication to reach employees, even 30% of the employees are inaccessible.[3]

Under *Babcock*, property rights had to yield to organizational rights if no other means to reach employees were readily available. The requirement of the *Excelsior* rule now insures that a means to reach employees, before an election, other than by solicitation on the employer's property, is readily available. The validity of a union's asserted need to utilize the employer's private property to campaign must now be measured against the developments of *Excelsior* and *Gissel*. That is, the requirements of *Babcock* must thus be interpreted to take account of the access to employees already afforded and guaranteed by *Excelsior* wholly independent of other customary means of communication which also remain available.

3. If the *Excelsior* list is incomplete or inaccurate, a union may object to the results of the election. Therefore, its organizational rights are now further protected by the Board's *Excelsior* rule.

CONCLUSION.

For the above reasons, a writ of *certiorari* should issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

OTTO F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South La Salle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.